SUPREME COURT, U.S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79-722

James Jackson, Jr. ..... *Petitioner*

V.

State of Arkansas ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

ROBERT D. SMITH, III
SMITH, JERNIGAN & SMITH
1000 Tower Building
Little Rock, Arkansas 72201

H. VANN SMITH
SMITH, JERNIGAN & SMITH
1000 Tower Building
Little Rock, Arkansas 72201

Attorneys for Petitioner

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PETITION FOR A WRIT OF CERTIORARI
TO THE ARKANSAS COURT OF APPEALS

Petitioner, James Jackson, Jr., prays that a writ of certiorari issue to review the judgment of the Arkansas Court of Appeals entered on August 8, 1979 and released for publication on August 29, 1979.

CITATION TO OPINIONS BELOW

The opinion of the Arkansas Court of Appeals affirming the jugment against the Petitioner and finding him guilty is reproduced as Appendix A to the petition.

JURISDICTION

The final order of the Arkansas Court of Appeals was made and entered on August 8, 1979, and is appended hereto.

Under Rule 29 of the Arkansas Supreme Court, the Arkansas Court of Appeals is the court of last resort in issues involved in this case. This case was appealed to the Supreme Court of Arkansas, but under Rule 29.3 of the Arkansas Supreme Court, the matter was assigned to the Arkansas Court of Appeals. Rule 29 of the Arkansas Supreme Court is set out in full in Appendix B, hereto.

QUESTIONS PRESENTED

1. The Trial Court erred in sentencing the Appellant under amended law, increasing his punishment over law existent at the time the offense was committed, therefore in derogation of the State and Federal Constitutions prescribing Ex Post Facto laws.

2. The Trial Court erred in allowing testimony concerning evidence found during an illegal warrantless search of a vehicle in violation of the Fourth Amendment to the U. S. Constitution.

3. The Trial Court erred in allowing testimony concerning evidence found during a search not incident to a valid arrest.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional Amendment involved is the Fourth Amendment to the U.S. Constitution.

STATEMENT

This Petition for Writ of Certiorari is from the Affirmance by the Arkansas Court of Appeals, a Court of last resort in Arkansas, of a Judgment of Conviction after trial on September 20, 1978, before the Honorable William J. Kirby, Judge of the Pulaski Circuit Court, First Division, Pulaski County, Arkansas in violation of Ark. Stat. Ann. §41-2203, Theft of Property, said offense occuring on or about August 7, 1976. The Petitioner was sentenced under the Habitual Felon Provision of Ark. Stat. Ann. §41-1001 and received a five year prison term.

The facts of the case can be briefly stated as follows:

On November 22, 1978, a felony information was filed against the Petitioner, James Jackson, Jr., charging him with Theft of Property. The Petitioner was accused of taking a recapped tire and wheel from a trailer belonging to Fisher Lime and Cement Co. in North Little Rock, Arkansas.

The State presented its case through three main witnesses.

Mr. W. L. Landers identified the recapped tire as being the one he had purchased July 30, 1976 (T. 21) and also testified as to the value of the recapped tire and wheel as being $142.85. (T. 22)

Mrs. Geraldine Doyle testified that she lived across the street from Fisher Lime and Cement Co., where the offense occurred, (T. 24) and said that she saw two men rolling a tire from the parking lot to their automobile and put the tire into the trunk of a greenish color car. (T. 25) She testified that she could not identify the two men involved (T. 27, 29) and also subsequently testified that she could not identify the automobile. (T. 28, 29) Mrs. Doyle did testify as to the general direction the automobile was traveling as it left Fisher Lime and Cement Co. (T. 25)

Officer Lindsey Wooten testified that at approximately 11:05 P.M. on August 7, 1976, he received a radio call from headquarters notifying him that a theft of property was in progress at Fisher Lime and Cement Co. at 1600 East Washington, North Little Rock, Arkansas. (T. 32) He testified that he was traveling east on East Second Street when he first spotted an automobile traveling west on Second Street. (T. 33) He testified that there were no other vehicles in sight on Second Street. (T. 33) He said that as his vehicle and the other vehicle were approaching each other, the other vehicle turned right on to 12th Street. (T. 33,34) Officer Wooten then called for back up units for assistance. (T. 34) The officer testified that he followed the

vehicle and stopped it and had both black males exit from the vehicle as backup units arrived to assist him. (T. 34) He testified that the automobile was "low in the rear". (T. 34, 42) He took the keys from the driver of the vehicle, Charles Laws, and without seeking permission from either of the two men, opened the trunk wherein he found the recapped tire. (T. 43) He testified he considered the men under arrest prior to searching the trunk and considered that neither man could have left if they had wanted to. (T. 43)

The Defendant moved to suppress any testimony about the stolen tire (T. 44) and moved to suppress any testimony about any evidence recovered from the car on the ground that there was an illegal search and seizure. (T. 45) The Court denied both motions.

A timely appeal was filed to the Arkansas Court of Appeals. The Court wrote an opinion by the Honorable James H. Pilkinton, which was delivered August 8, 1979 and released for publication on August 29, 1979. The mandate was dated August 28, 1979.

REASONS FOR GRANTING WRIT

1. Certiorari should be granted because the Trial Court erred in sentencing the Petitioner under amended law, increasing his punishment over law existent at the time the offense was committed, therefore in derogation of the State and Federal Constitutions prescribing *Ex Post Facto* Laws.

As stated by the felony information (T. 1), the offense took place on or about August 7, 1976. In the lower half of the felony information, it is stated that "James Jackson, Jr., has previously been convicted of at least two prior felonies and consequently his sentence should be increased as provided for in Ark. Stat. Ann. §41-1001."

Ark. Stat. Ann. §41-1001 became effective on January 1, 1976. The effective date was provided for in Section 101 of Acts of Arkansas, 1975, No. 280.

Under Ark. Stat. Ann. §41-1001, as it was in effect at the time of the alleged incident, it provided, *Inter Alia:*

> "(1) A defendant who is convicted of a felony and who has prviously been convicted of two or more felonies may be sentenced to an extended term of imprisonment as follows: (a) not less than 10 years nor more than 50 years, or life, for a class A felony; (b) not less than 5 years nor more than 30 years, for a class B felony; (c) nor less than two years nor more than 10 years, for a class C felony; . . . "

In 1977, the year after the Petitioner was charged as a habitual felon in a felony information filed November 22, 1976 (T. 1), Ark. Stat. Ann. §41-1001 was amended. Acts of Arkansas 1977, No. 474, Section 4, P. _____. The 1977 amendment increased the penalty range of a class C felony over the range which was in effect when the Petitioner was charged. The statute with its 1977 amendment increases the range for a class C felony, for a person who has more than one but less than four felonies from 2 to 10 years, up to 3 to 15 years. The Petitioner was charged with a class C felony.

The Constitution of Arkansas, Article II., Section 17, states: "No bill of attainder, *Ex Post Facto* Law, or law impairing the obligation of contracts shall ever be passed; and no conviction shall work corruption of blood or forfeiture of the State."

An *Ex Post Facto* Law declares an offense to be punishable in a manner that it was not punishable at the time it was committed, and relates exclusively to criminal proceedings. See *Taylor v. Governor*, 1 Ark. 21. More recently, the Arkansas Supreme Court stated " . . . an offense is punished in accordance with law as it existed when the offense was committed . . . " *Campbell v. State*, 265 Ark. 77, 92. The case at hand is distinguished from the case of *Sims v. State*, 262 Ark. 288, 556 S.W.2d 141, in that there is no contention that the Petitioners' two prior convictions which occurred before the sentence enhancing statute was effective, was a prohibitive application of an *Ex Post Facto* Law. In this case, the Petitioner submits that the Habitual Criminal Act was in effect at the time he was charged for this crime but between the time he was charged and tried, the law was amended increasing the punishment over that which was in effect at the time he was charged.

In addition to the constitutional prohibitions, Ark. Stat. Ann. §41-102, states *Inter Alia:*

> "(5) When all or a part of a statute defining a criminal offense is amended or repealed, the statute or a part thereof so amended or repealed shall remain in force for the purpse of authorizing the prosecution, conviction, and *punishment* of a person committing

an offense under the statute or part thereof prior to the effective date of the amending or repealing Act." (emphasis added)

Petitioner contends that an error of law made by the Trial Court in sentencing is plain error and, therefore, while not objected to at trial, can be raised at this time on appeal. This error of law subjected the Petitioner to a far greater penalty, i.e. 3 to 15 years rather than 2 to 10 years, than was allowed by the law in effect at the time he was charged with the offense.

2. Certiorari should be granted because the Trial Court erred in allowing testimony concerning evidence found during an illegal warrantless search of a vehicle in violation of the Fourth Amendment to the U. S. Constitution's fundamental guarantees.

The Petitioner is acutely aware of the many exceptions to the search and seizure laws when concerning automobiles. The Arkansas Supreme Court recently decided *Perez v. State*, 260 Ark. 438, 541 S.W.2d 915 (1976) where it said that "whenever a police officer has reasonable cause to believe that contraband is being unlawfully transported in a vehicle, then the vehicle may be the object of a warrantless search."

The Petitioner is also aware of a line of cases such as *Coolidge v. New Hampshire*, 403 U.S. 442, 91 S.Ct. 2022, 29 L.Ed.2d 564, where the Court said "the underlying rational of *Carroll* and of all the cases that have followed, it is that there is a 'necessary difference' between a search of a store,

dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, *where it is not practical to secure a warrant*, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. (emphasis supplied)"

However, the Court has steadfastly held that before a warrantless search of an automobile can take place, the officer must have probable cause to search the automobile. It is "clear that searches of motorcars must meet the test of reasonableness under the Fourth Amendment before evidence obtained as a result of such searches is admissible." *Preston v. United States*, 376 US 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964) and *Carroll v. United States*, 267 US 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

The issue in the present case is whether or not the officer had probable cause to stop and search the vehicle.

The only witness to the alleged offense was Mrs. Geraldine Doyle. She testified that she saw two men rolling a tire from the parking lot of Fisher Lime and Cement Company and saw them putting the tire into the truck of a car. (T. 25) She described the car as being greenish in color (T. 25) but on cross-examination, it was revealed that she testified in the North Little Rock Municipal Court on November 4, 1976 that the color of the car was tan. (T. 28) Mrs. Doyle could not identify the make or model of the automobile nor could she give any other distinguishing

features of the vehicle (T. 25, 29), neither could Mrs. Doyle identify the two subjects who got into the car at Fisher Lime and Cement Company (T. 26, 27, 29, 31). The only information she could give to the police was that the vehicle turned west on Second Street when it left the scene of the alleged offense. (T. 25, 29, 31) She could not testify that the vehicle continued in a westerly direction on Second Street as it was out of her range of vision.

Officer Wooten testified that he received a communication over the police radio that a theft of property was in progress at Fisher Lime and Cement Company at 1600 E. Washington (T. 32) and that two black males were involved. (T. 38) Further, that the vehicle was full-sized and had a light top and a dark bottom. (T. 38) It is important to note that Mrs. Doyle never testified that the subjects were black as she could not give descriptions of the men involved nor did she testify that the car was full-sized or that it had a light top. Officer Wooten testified that he was on East Washington when he received the radio call that the subject's vehicle was turning on West Second Street. (T. 33) Wooten turned on Second Street at the 800 block heading east. He testified that the first time he saw the defendant's vehicle was when he was at the 800 block of Second Street and the other vehicle was "traveling toward me approximately a distance of 5 or 6 blocks ahead of me". (T. 33) He stated there were no other vehicles on Second Street. (T. 33)

The defendants were at least four blocks from Fisher Lime and Cement Company when Officer Wooten first observed their car. (T. 36) He admitted that the area

surrounding Fisher Lime and Cement Company was primarily residential with a few businesses along Second Street and that it would not be unusual for two black males to be in a car in that particular area at that time of night. (T. 39, 41) Officer Wooten further testified that the automobile was not violating the traffic laws and was being operated in a lawful manner. (T. 41)

In order to find probable cause, the information given by Mrs. Doyle must be carefully scrutinized. The only information she could give was that the automobile turned west on Second Street as it left Fisher Lime and Cement Company. She could not testify as to where the vehicle travelled after turning onto Second Street as it was outside her range of vision. Neither could she identify the vehicle as to make or model nor could she give a description of the car other than as to the color, to which she gave conflicting answers. She could not identify the subjects involved and did not at any time testify that the men were black.

The only information Officer Wooten received was that the defendant's vehicle turned west on Second Street. He admitted that he did not even see the vehicle until there was distance of four blocks between the vehicle and Fisher Lime and Cement Company.

Accordingly, the Petitioner contends that Officer Wooten did not have probable cause to stop and search the vehicle and that any evidence derived from the illegal search should not have been allowed to be introduced into evidence.

3. Certiorari should be granted because the trial court erred in allowing testimony concerning evidence found during a search not incident to a valid arrest.

The Petitioner relies on *United States v. Edwards*, 554 F.2d 1331 (1977) for the proposition that the search of the automobile in question was not incident to a valid arrest of the Defendant. In *Edwards, supra.*, Officer M. L. Williams received information that Defendant Edwards was stealing checks from mail boxes. Officer Williams located a Cadillac driven by the Defendant, stopped the Cadillac and arrested Edwards for driving without a license. Edwards was placed in the back seat of the patrol car. Officer Williams and another officer then searched the Cadillac, including the trunk, glove compartment and beneath the overlapping carpet in the space between the driver's seat and the door where they found two checks that proved to be stolen from the mail. Edwards was subsequently indicted, tried, convicted and sentenced to three years imprisonment.

Edwards raised the issue, among others, that the search was not incident to the valid arrest. The Court stated that the purposes of a search incident to a lawful arrest are (1) it allows the arresting officer to disarm the suspect, and (2) prevents the suspect from destroying the evidence. The Court cited *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) to explain how far an officer can go in searching an automobile incident to a lawful arrest. Basing its decision on the *Chimel* standards, the Court reversed the Edwards conviction as Edwards was

securely locked in the rear of the patrol car and was incapable of retrieving weapons or evidence from the vehicle. The Court concluded that the officers could reasonably have feared neither that Edwards would procure a weapon nor that he would destroy the evidence.

The facts in the present case are strikingly similar to *Edwards, supra.* Officer Wooten testified that while following the suspects, he called for assistance of a unit to back him up. (T. 34) As he stopped the vehicle and had both men exit the automobile, the backup units arrived to assist Officer Wooten. (T. 34) The dialogue between the Defendant's attorney and Officer Wooten thus explains the circumstances of the search, as follows:

Q. (Defendant's Attorney) How did you search the vehicle?

A. (Officer Wooten) Took the keys—brought both the subjects out of the vehicle, frisked them, took the keys from Mr. Laws, opened the trunk of the vehicle.

Q. Did he give you the keys, or did you take them from him?

A. I took them from him.

Q. Did you ask him if you could conduct a search of the car?

A. As far as I was concerned, they were both under arrest for theft of property.

Q. My question was, did you ask for permission to search the car?

A. No, I did not.

Q. You did have them in custody; they could not have left if they had wanted to?

A. No.

Q. Is that correct?

A. That is correct.

Q. And you had the keys to the car. Am I correct that the car could not have been driven off, you had the keys in your hand?

A. Yes, and they were under arrest.

Q. And I think you have already testified that, as far as you were concerned, they were under arrest?

A. Yes, sir.

Q. You did not get a warrant to search the car?

A. No, I did not.

Q. And no permission was given to you by either the driver or the occupant to search the car?

A. No, there was not. (T. 43, 44)

It is obvious that neither Laws, the driver of the vehicle, or the Petitioner, the passenger of the vehicle, could have retrieved a weapon from the automobile. Both men had been frisked and were outside of the car. (T. 43) Other police units were present to assist Officer Wooten. (T. 34) Neither was there a reasonable chance that Laws or the Petitioner could destroy any evidence as the recapped tire was in the trunk and only Officer Wooten had the keys to the trunk. Further, even Officer Wooten stated that the men were in custody and that there was no possible way that the vehicle could be driven off by the suspects since he had the keys. (T. 43)

The Petitioner challenges the officer's right to carry on his search in areas of the vehicle that are completely out of control of the Petitioner, i.e., the trunk area. The Petitioner strongly urges that the officer over-stepped his legal rights by searching the trunk without a search warrant or the permission of the Petitioner.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT D. SMITH, III
SMITH, JERNIGAN & SMITH
1000 Tower Building
Little Rock, Arkansas 72201

H. VANN SMITH
SMITH, JERNIGAN & SMITH
1000 Tower Building
Little Rock, Arkansas 72201

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, H. Vann Smith, one of the attorneys for James Jackson, Jr., Petitioner herein, hereby certify that, on the 2nd day of November, 1979, I served two copies of the foregoing petition for writ of certiorari on the Respondent by mailing the copies in a duly addressed envelope, with postage prepaid to Honorable Steve Clark, Attorney General of the State of Arkansas, Justice Building, Little Rock, Arkansas.

H. Vann Smith

H. Vann Smith

APPENDIX A

James JACKSON, JR. v. STATE of Arkansas

CA CR 79-2

Opinion delivered August 8, 1979
and released for publication August 29, 1979

1. CRIMINAL LAW—SENTENCING—SENTENCE VALID WHERE WITHIN PERMISSIBLE RANGE OF SENTENCE ALLOWED BY LAW.—Although Ark. Stat. Ann. §41-1001 (Repl. 1977), under which defendant was sentenced, had been amended subsequent to the date the crime was committed, nevertheless, where the sentence imposed by the trial court was within the permissible range of sentencing allowed by §41-1001, both at the time of commission of the crime and at the time of trial, there is no merit to defendant's contention that it was reversible error for the court to sentence him under the statute in effect at the time of trial, particularly where defense counsel made no objection to the sentence when it was imposed, but, to the contrary, agreed that it was rendered pursuant to applicable law.

2. CRIMINAL PROCEDURE—MOTION TO SUPPRESS EVIDENCE—WHEN TIMELY MADE.—Rule 16.2, Ark. Rules of Crim. Proc., requires that a motion to suppress evidence be filed at least 10 days before trial, except where good cause is shown for the delay, and where a defendant failed to make any motion to suppress evidence obtained in a search prior to the objection which he made

at trial to the admission of said evidence, which he contended was taken in a warrantless search not incidental to his arrest, defendant's motion to suppress the evidence was not timely made, particularly where defendant made no showing of good cause for which the court could have entertained such a motion.

3. CRIMINAL LAW—SEARCH & SEIZURE—WHEN WARRANTLESS SEARCH OF VEHICLE PERMISSIBLE.—Where there is ample reason for an officer to have reasonable cause to believe that contraband is being unlawfully transported in a vehicle, a warrantless search of the vehicle is permissible. [Rules 12.1 (d), 12.4 (a), and 14.1 (a), Ark. Rules of Crim. Proc.]

4. SEARCH & SEIZURE—WARRANTLESS SEARCH OF VEHICLE INCIDENT TO ARREST—WHEN VALID.—A search of a vehicle without a search warrant but incident to an arrest was valid under the circumstances, where the arresting officer who stopped the vehicle had information that a crime was in progress and that two suspects had been observed rolling a large tire from the scene of the crime to a parking lot; the vehicle in question appeared to contain a heavy load and was occupied by two men meeting the description of the two suspects which had been furnished the officer by radio; and the incident occurred late at night, which made it impractical to obtain a search warrant.

An appeal from Pulaski County Circuit Court, First Division, Honorable *William J. Kirby*, Judge; affirmed.

John W. Achor, Public Defender, by: *William H. Patterson, Jr.*, Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Dennis R. Molock*, Asst. Atty. Gen., for appellee.

JAMES H. PILKINTON, Judge. This case was appealed to the Arkansas Supreme Court, and by that court assigned to the Arkansas Court of Appeals pursuant to Rule 29.3 of the Arkansas Supreme Court.

On November 22, 1976, an Information was filed by the Prosecuting Attorney of the Sixth Judicial District in which the appellant was charged with theft of property. A jury was waived and trial was on September 20, 1978. The court found the appellant guilty as charged. Upon the state's presentation of the prior felony convictions, appellant was sentenced to five years imprisonment according to Ark. Stat. Ann. Sec. 41-1001 (Repl. 1977).

The appellant contends that the trial court erred in sentencing him under Ark. Stat. Ann. Sec. 41-1001 (Repl. 1977). He bases his argument on the fact that the offense occurred August 6, 1976, at which time Ark. Stat. Ann. Sec. 41-1001 provided a different penalty for a Class "C" felony; and, that the statute as amended was an ex post facto law as applied to him. The prior statute provided a penalty of not less than two years nor more than ten years for a Class "C" felony. Appellant correctly states that Ark. Stat. Ann. Sec. 41-1001 was amended in 1977 to increase the penalty to not less than three years nor more than fifteen years if the conviction is a Class "C" felony, thereby increasing the

minimum sentence by one year and the maximum sentence by five years. In the present case appellant, after being found guilty, was sentenced to five years imprisonment. Thus, the sentence imposed by the trial court was within the permissible range of sentencing allowed by Sec. 41-1001 both at the time of the commission of the crime and at the time of the trial.

The record shows that appellant not only failed to object to the sentencing but concurred with the court on the sentence. The Arkansas Supreme Court has previously held that questions involving sentencing will not be considered for the first time on appeal. *Campbell v. State*, 265 Ark. 77, 576 S.W.2d 938 (1979). *McCoy v. State*, 259 Ark. 607, 535 S.W.2d 439 (1976).

Viewing the totality of the circumstances including the lack of an objection at trial, defense counsel's agreement with the trial court as to the applicable law, and the fact that the sentence imposed by the trial court was within the permissible range, we hold that reversal is not warranted on this point as claimed by appellant.

Appellant also contends that the trial court erred in allowing testimony concerning the recovery of a stolen tire from the vehicle in which he was riding. He contends that the recovery of the stolen tire was the product of an illegal search and seizure. Appellant's argument is based on the contention that the search conducted in this case was a warrantless search not incidental to the arrest and therefore should have been excluded.

Rule 16.2 Arkansas Rules of Criminal Procedure provides:

> "The motion to suppress shall be timely filed but not later than ten days before the date set for trial of the case, except that the court for a good cause shown may entertain a motion to suppress at a later time."

There is no indication whatsoever that appellant made any motion to suppress evidence in this case prior to the objection made at the trial. It seems clear therefore that the appellant's motion to suppress evidence in testimony produced at trial was not timely made. Also there is no indication that appellant made any showing of good cause for which the court could have entertained a motion to suppress which was not timely made.

The Arkansas Supreme Court addressed a similar issue in *Parham v. State*, 262 Ark. 241, 555 S.W.2d 943. In *Parham*, supra, the appellant was convicted of possession of marijuana with intent to deliver. In affirming appellant's conviction, the Supreme Court pointed out that three of his six points for reversal must fail as his motions to suppress were filed too late. The appellant in Parham filed his motion to suppress a day or two before the date for trial whereas in the present case no motion was made prior to the trial. We hold therefore that appellant's motion to suppress testimony concerning any evidence relating to the search and seizure of the stolen tire was not timely filed. See also *Burnett v. State*, 262 Ark. 225, 564 S.W.2d 211 (1978). The further contention that the search of the vehicle and seizure of the stolen tire were illegal is also without merit. Appellant does not challenge the determination of probable

cause to stop the vehicle, nor does he challenge the validity of the arrest. He argues however that the search could not be construed as incident to a valid arrest. The search in this case was clearly within the guidelines established by the Arkansas Rules of Criminal Procedure. Rule 12.1 provides, inter alia:

> An officer who is making a lawful arrest may, without a search warrant, conduct a search of the person or property of the accused for the following purposes only:
>
> (d) to obtain evidence of the commission of the offense for which the accused has been arrested or to seize contraband, the fruits of the crime, or other things criminally possessed or used in connection with the offense.

Similarly, Rule 12.4 (a) provides:

> If, at the time of the arrest, the accused is in a vehicle or in the immediate vicinity of a vehicle of which he is in apparent control, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things which are connected with the offense for which the arrest is made, the arresting officer may search the vehicle for such things and seize anything subject to seizure and discovered in the course of the search.

Attention is also called to Rule 14.1 which further addresses the issue of vehicular searches as follows:

> (a) An officer who has reasonable cause to believe that a moving or readily moveable vehicle is or contains things subject to seizure may, without a

> search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is:
>
> (i) on a public way or waters or other areas open to the public; . . .

The testimony presented at trial indicated that there was ample reason for the officer to have reasonable cause to believe that contraband was being unlawfully transported in the vehicle in question, thereby rendering a warrantless search of the vehicle permissible under the circumstances existing.

Officer Whooten testified that while receiving radio communication that a theft of property was in progress at a certain location, he was west bound on the same street on which appellant was attempting to flee. The officer further testified that the appellant's vehicle was the only vehicle on the street besides the police car; and that appellant's car was sitting low in the rear. The Arkansas Supreme Court has previously held that whenever a police officer has reasonable cause to believe that contraband is being unlawfully transported in a vehicle, then the vehicle may be the object of a warrantless search. *Perez v. State*, 260 Ark. 438, 541 S.W.2d 915 (1976). *Gordon v. State*, 259 Ark. 134, 529 S.W.2d 330 (1976). As pointed out in *Perez*, supra, the determination of the soundness of the officer's concluding that probable cause for the search existed is made in the light of the particular situation, with account taken of all the circumstances. The facts in each case are likely to be different. Considering all of the circumstances in this case, it appears that the officer had reasonable cause to believe

that the vehicle was unlawfully transporting contraband and thus had probable cause to stop the vehicle.

The search was valid if it was not reasonably practical to obtain a search warrant. *Perez*, supra, at 444; *Tygart v. State*, 248 Ark. 125, 451 S.W.2d 255 (1970), cert. denied, 400 U.S. 807, 91 S.Ct. 50, 27 L.Ed. 2d 36 (1970). There were factors present in this case which would indicate that it was not reasonably practical for Officer Whooten to obtain a search warrant. He had information that a crime was in progress; that the criminals had been observed rolling a large tire from the scene of the crime to a parking lot; and the hour was late at night. Upon observing that the vehicle appeared to contain a heavy load as it seemed to be "sitting low in the rear", and was occupied by two suspects meeting the description of the information furnished him by the radio, the officer stopped the vehicle. For the officer to have gone in quest of a search warrant at that hour of the night under the circumstances would have been impractical. This coupled with the other significant facts then existing produced a situation whereby warrantless search incident to the arrest was not only reasonable but would have rendered the officer subject to criticism had he not searched the automobile.

Affirmed.

APPENDIX B

RULE 29.

APPELLATE JURISDICTION
OF THE COURT OF APPEALS

1. All cases heretofore appealable to the Supreme Court shall, from and after July 1, 1979, be appealed to the Court of Appeals, except that the following cases shall be appealed to the Supreme Court:

a. All cases involving the interpretation or construction of the Constitution of Arkansas;

b. Criminal cases in which the death penalty, life imprisonment, or a cumulative sentence of more than 30 years imprisonment, has been imposed;

c. Cases in which the validity, interpretation, construction or constitutionality of an act of the General Assembly, an ordinance of a municipality or county, or a rule or regulation of any court, administrative agency or regulatory body is in question; declaratory judgment actions pertaining to the validity or applicability of a rule of an agency subject to the Administrative Procedure Act under Ark. Stat. Ann. §5-705 (Repl. 1976);

d. Cases appealed from orders of the Arkansas Public Service Commission, the Arkansas Transportation Commission, and the Arkansas Pollution Control

Commission, and cases involving rates for public utilities fixed by municipal authorities;

e. Appeals in cases based on petitions for post-conviction relief under Rule 37 of the Arkansas Rules of Criminal Procedure;

f. Cases of quo warranto, prohibition, injunction or mandamus directed to state, county or municipal officials or to circuit, chancery or probate courts;

g. Cases pertaining to elections and election procedures;

h. Cases involving the discipline of attorneys-at-law and other cases arising under the power of the Supreme Court to regulate the practice of law;

i. Motions or petition for rule on the clerk under Rule 5 of the rules of the court; for writ of certiorari to complete the record under Rule 26 and for admission to bail.

2. An appellant who contends that his appeal should be heard in the Supreme Court, instead of the Court of Appeals, pursuant to Rule 29 (1) (a) through (1) (h) shall designate on his notice of appeal and designation of the record the applicable subdivision of Rule 29 (1) which gives the Supreme Court appellate jurisdiction. In addition, appellant shall preface his abstract and brief with a jurisdictional statement not exceeding two pages in length.

3. The Supreme Court may transfer to the Court of Appeals any case appealed to the Supreme Court and may transfer to the Supreme Court any case appealed to the Court of Appeals.

4. The Court of Appeals may certify any case appealed to the Supreme Court, if the Court of Appeals finds that the appealed case:

a. is excepted from its jurisdiction by Section 1 hereof;

b. involves an issue of significant public interest or a legal principle of major importance.

The Supreme Court may accept for its docket cases so certified, or may remand any of them to the Court of Appeals for decision.

5. No case filed in either the Supreme Court or the Court of Appeals shall be dismissed for having been filed in the wrong court, but shall be transferred or certified to the proper court.

6. No appeal as of right shall lie from the Court of Appeals to the Supreme Court. Certiorari may be granted by the Supreme Court for review of decisions of the Court of Appeals if, but only if, the Supreme Court determines that the case (a) should have come to the Supreme Court originally under section 1 of this rule, (b) should have been certified to the Supreme Court under section 4B of this rule, or (c) was decided in the Court of Appeals by a tie vote.

Petitions for review must be in writing and must be filed within 17 calendar days from the date of the decision. Petitions may be typewritten and shall not exceed two legal size, double-spaced, typewritten pages in length. The petition must briefly and distinctly state the basis upon which the case should be reviewed and may include citations of authority or references to statutes or constitutional provisions. Briefs will not be accepted and oral argument will not be heard in support of petitions for review; however, a party may attach to his petition for review a copy of his petition for rehearing in the Court of Appeals.

7. It is the intention of this court by the adoption of this rule to achieve an equalization of the appellate workload between the Supreme Court and the Court of Appeals. If the classifications made herein do not achieve this objective, adjustments will be made.

8. Except as herein provided, appeals to the Court of Appeals shall be taken in the same matter as heretofore provided for appeals to the Supreme Court.

9. This rule is adopted pursuant to Amendment 58 to the Constitution of Arkansas. [Adopted May 14, 1979.]